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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 982

FRED W. STOVER,

Petitioner,

vs.

FARMERS' EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, A Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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FRED W. STOVER,

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vs.

FARMERS' EDUCATIONAL AND COOPERATIVE UNION OF AMERICA, A Corporation,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

Petitioner, Fred W. Stover, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled cause on January 20th, 1958.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported in 250 F. 2d 809. A copy of it is printed in Appendix "A" hereto, infra, pages 15-24.

An earlier opinion of the Court of Appeals affirming an injunction issued by the District Court is reported in 247 F. 2d 809. The District Court's Findings of Fact, Conclusions of Law, Judgment and Decree, in that case, are appended in a footnote to 247 F. 2d 809, 810, and its opinion is reported in 141 F. Supp. 820. The Findings, Conclusions and Decree in the contempt case, involved here, are found at R. 64-70; its opinion at R. 61-64 and its Memorandum Opinion on Objections to Findings, Conclusions and Judgment, and Order overruling same, at R. 70-71.

JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1958. On April 21, 1958, by order signed by Justice Charles E. Whittaker, the time for filing this Petition for Writ of Certiorari was extended to and including May 6, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED

1. Whether in a civil contempt proceeding in which the alleged contemnor is charged with violating an injunction issued in a suit to enjoin the infringement of registered trademarks, under the Lanham Act, Title 15,

U. S. C. A., Sections 1051-1127, the accused may be found guilty of contempt where the evidence shows only the use of trade names contained in the corporate titles of corporations and no use of trademarks, as such.

2. Whether a District Court of the United States may adjudge one guilty of contempt for the use of a trade name in the title of a corporation when the name is said to be an infringement upon a trademark registered under the Lanham Act, Title 15, U. S. C. A., Sections 1051-1127.

3. Whether in a civil contempt proceeding in the absence of proof of actual damages to a supposed contemnee from violation of an injunction a fine may be imposed upon the alleged contemnor.

4. Whether the courts below violated Rule 52 (a), Federal Rules of Civil Procedure, in disregarding the fact that contemnee failed to prove damages in a civil contempt proceeding as a condition precedent to imposing a fine upon the alleged contemnor.

5. Whether the Court of Appeals has decided federal questions in a way to conflict with prior applicable decisions of this Court (1) in finding petitioner was guilty of contempt in using a trade name which was the title of a corporate defendant, of which he was president, and that such use constituted an infringement of respondent's registered trademark, and, (2) in holding that in the original equity suit in which the injunction issued that jurisdiction was invoked and conferred by the provisions of Sections 1338 (a) and (b) of the Judiciary Act, when the District Court had made a finding that it had jurisdiction only under the Lanham Act, and, (3) in finding that it had authority and jurisdiction to make an original

finding of fact when its function and power in a case of this kind is purely appellate, as distinguished from original jurisdiction, and it had no right to substitute its findings with respect to issues of fact or jurisdictional questions for the findings of the trial court, and, (4) in approving the imposition of a fine in a civil contempt proceeding when there was no proof to establish any actual loss or damage suffered by the alleged contemnee as the result of the purported violation of an injunction.

—o—

STATUTES INVOLVED

The statutes involved are Title 15, U. S. C. A., Sections 1053 and 1054, and 28 U. S. C. A., Sections 1338 (a) and (b), which are printed in Appendix "B," infra pages 25-26.

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STATEMENT OF THE CASE

Petitioner is president of two corporations entitled "Iowa Farmers Union" (formerly "Farmers Educational and Cooperative Union of America, Iowa Division"), and "Iowa Union Farmer Association." The latter publishes a newspaper formerly called "Iowa Union Farmer." After issuance of an injunction, hereafter mentioned, the name of the newspaper was changed to "U. S. Farm Union News."

Respondent owns two registered trademarks, a collective mark, "Union Farmer" and a service mark, consisting of the words "Farmers Union." The trademarks are registered under the Lanham Act.

The "Iowa Farmers Union" was affiliated with respondent until 1954. Thereafter, its corporate title was changed to its present name, by amendment to its articles.

Respondent brought suit against petitioner, the corporations referred to above and others, to enjoin the defendants named from an alleged infringement of plaintiff's trademarks which had been registered under the Lanham Act, Title 15, U. S. C. A., Sections 1051-1127. The trial court held that federal jurisdiction was conferred by the Lanham Act and issued an injunction enjoining defendants from infringement. (141 F. Supp. 820.)

Upon appeal, the Court of Appeals affirmed, setting out in a footnote the findings, conclusions and decree of the trial court which are appended to the opinion (247 F. 2d 809, at 810). In finding of fact, paragraph 3, the trial court stated "Jurisdiction is invoked under the Lanham Act." In the original opinion handed down by the Court of Appeals it was stated, that "On the trial of the case the court held that federal jurisdiction was conferred by the Lanham Act. * * *" (810).

A timely Petition For A Rehearing having been filed, a Supplemental Opinion was later announced by the Court of Appeals, modifying and withdrawing some of the original opinion (247 F. 2d 819). In that opinion, the court receded from the views originally expressed to the effect that it was in accord with the opinion in *Stauffer vs. Exley*, 9 Cir., 184 F. 2d 962, and announced that it did not intend to hold that the Lanham Act conferred original jurisdiction upon District Courts in actions for unfair competition and then aligned itself with the rules laid down by the Second, Third and Fifth Circuits, declaring a rule

contrary to that stated by the Ninth Circuit in *Stauffer vs. Exley*, supra.

In that Supplemental Opinion the Court of Appeals stated that it was holding (819) that "the District Court had jurisdiction of the case under the Lanham Act and Title 28, United States Code, 1338 (a) and (b)." The trial court had made a finding that it had jurisdiction under the Lanham Act, only, and in its conclusions of law, paragraph 2, had stated: "This court has jurisdiction under the Lanham Act (Sections 114 (1114) and 1121, Title 15, U. S. Code) to enjoin the infringement of plaintiff's said marks by the defendants herein." (247 F. 2d 812.)

Nevertheless, the Court of Appeals attempted to make the finding, for the first time in the litigation, that the trial court had jurisdiction "under the Lanham Act and Title 28, United States Code, § 1338 (a) and (b) * * *." That finding was made in the new matter inserted in the opinion in the Supplemental Opinion handed down following the filing of the Petition for a Rehearing (which was denied).

The original complaint did allege that the District Court had jurisdiction under the Lanham Act, claimed jurisdiction by reason of diversity of citizenship and a claim in excess of $3,000.00, § 1332, Title 28, U. S. C. A., and under Section 1338, Title 28, U. S. C. A., pleading a cause of action for relief from unfair competition in a cause joined with a substantial and related claim under the trademark law. The trial court, however, in his findings limited the jurisdictional question to the Lanham Act, only. Apparently, upon the trial of the original equity

case the plaintiff abandoned its claim for unfair competition and relied solely upon the Lanham Act. The appellate court revived and resurrected Title 28, Sections 1338 (a) and (b) to buttress the claim of unfair competition.

The decree in the original equity suit, which petitioner was charged with violating, related only to the use of trademarks. Trade names were not mentioned in that decree. In the contempt proceeding respondent relied upon proof of the use of the trade names contained in the titles of the corporations of which petitioner was president and the use of the words "U. S. Farm Union News" to show a violation of the injunction. The evidence established that petitioner never used the registered trademarks of respondent at any time or place. The trial court and Court of Appeals held petitioner in contempt.

Petitioner testified that the assets of the Iowa Farmers Union belonged to its members. It was never a subsidiary of respondent. The assets of the Iowa Union Farmer Association are owned by members of that corporation. The boards and members of the two corporations are separate and distinct but in some cases membership overlaps. The Iowa Union Farmers Association has no connection with the respondent. It publishes the "U. S. Farm Union News," the newspaper. The corporation Iowa Union Farmers Association had used that corporate title since 1952 (R. 48, 49).

The only evidence bearing upon the question of damages suffered by respondent by reason of a violation of the injunction was testimony to the effect that since the original injunction decree of June 13, 1956, respondent had spent about $37,000.00 or $38,000.00 on its organiza-

tion work in Iowa, in addition to publications, news letters and other materials. Petitioner contends proof of what was spent does not prove damages or that respondent did not get value for what it spent, in Iowa.

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REASONS FOR GRANTING THE WRIT

We have pointed out that the complaint asserted federal jurisdiction was conferred (1) by reason of the Lanham Act, (2) because of diversity jurisdiction, under Section 1332, Title 28, U. S. Code, and, (3) by reason of the fact that plaintiff respondent's claim in the original equity suit was joined with a substantial and related claim under the trademark laws, under Section 1338 (b), Title 28, U. S. C.

The trial court held that jurisdiction was conferred under the Lanham Act, only. Common-law diversity jurisdiction, under Section 1332, Title 28, was wholly lacking because of a failure to prove the jurisdictional amount. *McNutt vs. General Motors Acceptance Corporation*, 298 U. S. 178; *KVOS vs. Associated Press*, 299 U. S. 269; *Gibbs vs. Buck*, 308 U. S. 66. In the original opinion of the Court of Appeals of August 5, 1957, it was stated in the second paragraph that the trial court had held that federal jurisdiction was conferred by the Lanham Act. There was no reference to any other source of jurisdiction in the trial court's findings, conclusions or decree, except the Lanham Act. Likewise, there was no reference to any other basis for the exercise of federal jurisdiction in the original opinion of the Court of Appeals filed on August 5, 1957. It was not until the filing of the

Supplemental Opinion, September 30, 1957, modifying the original opinion in the injunction suit, that it was suggested by the Court of Appeals that, in addition to the Lanham Act, jurisdiction was conferred by Section 1338, Title 28, U. S. Code.

Petitioner contends the Court of Appeals had no power to substitute its findings for those of the trial court on fact questions decided by the District Court. *Blackhawk Hotels Company vs. Bonfoey*, 227 F. 2d 232. No attack was made by anyone on the trial court's findings concerning the jurisdictional question. If they were not attacked, had adequate evidentiary support and were not induced by an erroneous view as to the law, they were conclusive. *Pendergrass vs. New York Life Insurance Co.*, 8 Cir., 181 F. 2d 136; *Noland vs. Buffalo Insurance Co.*, 8 Cir., 181 F. 2d 735; *Dierks Lumber & Coal Co. vs. Barnett*, 8 Cir., 221 F. 2d 695.

Petitioner contends that the use of the trade names and the name of the newspaper, "U. S. Farm Union News," did not violate the injunction against the infringement of respondent's registered trademarks "Union Farmer" and "Farmers Union" under the provisions of the Lanham Act, Title 15, Sections 1051-1127. The trial court in so many words recognized that "a trade-name is descriptive of the manufacturer or dealer himself and applies to a business and its good will, whereas a trademark in its technical sense, is applicable to vendible commodities." (R. 63.)

The Lanham Act does not authorize the registration of tradenames and they are not covered by its provisions with regard to trademarks. Sections 1053, 1054, 1126, 1127,

Title 15, U. S. C.; *King Pharr Canning Corporation vs. Pharr Canning Co.* (D. C. Ark.), 85 F. Supp. 150; *Esquire, Inc. vs. Maira*, 101 F. Supp. 398. In the Esquire case, the Court said: "Defendant's use of the name 'Esquire Shop' in connection with his men's clothing store is no technical infringement of plaintiff's trademark 'Esquire.'"

The courts recognize that trademarks and trade names are distinct concepts. *Acme Chemical Co. vs. Dubkin*, 61 F. Supp. 601, 606; *Nera-Wet Corporation of America vs. Never Wet Processing Corporation*, 277 N. Y. 163, 13 N. E. 755.

The Lanham Act does not confer jurisdiction as to a tradename suit between citizens of the U. S. A. in the absence of complete diversity jurisdiction. *American Auto Association vs. Spiegel*, 2 Cir., 205 F. 2d 771; *L'Aiglon Apparel vs. Lana Lobell, Inc.*, 3 Cir., 214 F. 2d 649; *Royal Lace Paper Works, Inc. vs. Pest-Guard Products*, 5 Cir., 240 F. 2d 814.

No product or merchandise was involved in the case at bar. Only trade names and the name of the newspaper were used. The issue is whether trade names are afforded protection by the Lanham Act. The words "trade names" appear only in Sections 1127, the definition section, and 1126, dealing with aliens and foreign conventions and treaties. The act makes no provision for registering trade names. The petitioner was not guilty of contempt by reason of the use of the trade names. *Food Fair Stores vs. Square Deal Market*, 116 Fed. Supp. 617; *In re Lyndale Farm*, 186 F. 2d 723; *Application of Radio Corporation of America*, 205 F. 2d 180.

The decision below is in conflict with prior decisions of this Court in that it sustained the finding of the District Court that a fine could be imposed in a civil contempt case in the absence of proof by the contemnee that it suffered actual damage by reason of a violation of the injunction issued in the original equity case. The only proof adduced by the plaintiff respondent in that connection was evidence of one witness as to the amount spent for organization expense between the date of the injunction and the date of the contempt hearing.

The rule has been settled since the Gompers case that in a civil contempt proceeding a fine may only be imposed as compensation for special injury for actual loss sustained by plaintiffs in an injunction suit. *Gompers vs. Buck's Stove & Range Co.*, 221 U. S. 418, 448, 55 L. Ed. 197, 31 S. Ct. 492; *United States vs. United Mine Workers*, 330 U. S. 258, 91 L. Ed. 884, 67 S. Ct. 677; *McComb vs. Jacksonville Paper Co.*, 336 U. S. 187, 93 L. Ed. 599, 69 S. Ct. 497; *Eustace vs. Lynch*, 80 F. 2d 652, 656; *Parker vs. U. S.*, 153 F. 2d 66.

Petitioner contends the opinion of the court below was in conflict with those cases which hold that a fine imposed in a civil contempt proceeding must not exceed the actual loss suffered by the contemnee and the rules laid down in *Leman vs. Krentler-Arnold Co.*, 284 U. S. 488, 76 L. Ed. 389, 52 S. Ct. 238; *Boylan vs. Detrio*, 187 F. 2d 375; *Christensen Engineering Co. vs. Westinghouse Air-Brake Co.*, 135 Fed. 774, 782; *Judelshon vs. Black*, 64 F. 2d 116.

Evidence as to what respondent spent fell far short of proving loss or damage. Since the Gompers case such

proof has been regarded as essential before a fine may be imposed in a civil contempt case.

In recent cases, applying the tests laid down in the Gompers case, we have, refusal to obey a subpoena duces tecum, *Penfield vs. Securities & Exch. Com'n*, 330 U. S. 585, and refusal to obey a court order to appear before a master for examination, *Duell vs. Duell*, 178 F. 2d 68, which have been held to be civil contempts, and judgments appropriate only to criminal proceedings have been reversed.

The law only authorizes the court to award plaintiff in a proceeding of this kind such damages as it proves it suffered, due to a violation of the injunction decree out of which the contempt charges grew. In a civil contempt, the fine should be payable to plaintiff. In the case at bar it was required to be paid to the clerk, not the respondent. The cases recognize that a fine is imposed in a civil contempt for the purpose of making defendant pay compensation for the loss caused to plaintiff by a violation of the decree and the fine must be based upon proof of the damage actually sustained. *United States vs. United Mine Workers*, 330 U. S. 258, at 304, 67 S. Ct. 677, at 701, 91 L. Ed. 884. *Parker vs. U. S.*, 1 Cir., 153 F. 2d 66, at 71.

Under Rule 52 (a), Federal Rules of Civil Procedure, the trial court was required to make and file findings of fact, as the proceeding was tried to the court. The trial court made no finding to the effect that respondent had suffered any loss or damage as the result of any violation of the injunction of June 13, 1956, by petitioner. Apparently, the trial judge believed no damages

were proven. When objections were raised that in the absence of proof of damages he had no legal right to impose the proposed fine, payable to the Clerk, the trial judge in his Memorandum Opinion of April 25th, 1957, (R. 70-71), took the position that the proceeding partook partly of the nature of a criminal proceeding for contempt, referring to Sections 401 and 402, Title 18, U. S. C. A., relating to criminal contempts. He overlooked the prohibition against "scrambling" the two kinds of contempts announced in *Penfield Co. vs. Securities & Exchange Com'n*, 330 U. S. 585. But he made no finding that respondent had sustained damage. It was conceded by counsel for respondent, in open court, in the District Court and Court of Appeals, that this proceeding was a civil contempt, as distinguished from a criminal contempt, proceeding. Had this been a law action, tried to a jury, the trial court would have been obliged to direct a verdict for petitioner, on account of the failure of respondent to prove damages. As the trial court found no damages, the appellate court had no power to make original findings of fact as to damages. *Blackhawk Hotels Company vs. Bontocy*, 8 Cir., 227 F. 2d 232. This was another instance of the Court of Appeals attempting to substitute its findings for those of the *nisi prius* court. In doing so, the spirit and letter of Rule 52 (a) were disregarded. As there was no proof of damages, in any event, the cause should have been reversed.

In setting aside the trial court's finding as to jurisdiction the Court of Appeals forgot what it said in *Blackhawk Hotels Co. vs. Bontocy*, 227 F. 2d 232, where it stated: "The jurisdiction of this court is appellate and it has no right to retry the issues of fact or substitute

its judgment with respect to such issues for that of the trial court." The Lanham Act does not apply to the use of trade names. The action of the court below has violated Rule 52 (a) of the Rules of Civil Procedure in such a way as to call for the exercise of this Court's supervisory corrective authority. There can be no "scrambling" of contempt proceedings under the rule announced in the Penfield case. It was conceded below that this was a civil contempt proceeding. Therefore, the fine which was imposed on petitioner should not have been approved in the absence of evidence respondent actually suffered loss, and the amount thereof. Otherwise, the amount of the fine would be based on conjecture and be no more than an arbitrary decision. *Norstrom vs. Wahl*, 7 Cir., 41 F. 2d 910, 914; *Christensen Engineering Co. vs. Westinghouse Air Brake Co.*, 135 Fed. 774, at 782.

CONCLUSION

For the foregoing reasons, it is submitted that this petition should be granted.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS

EIGHTH CIRCUIT

No. 15833

January 20, 1958

FRED W. STOVER

Appellant,

vs.

FARMERS' EDUCATIONAL AND COOPERATIVE UNION OF AMERICA,

Appellee.

James R. McManus, *Attorney for Appellant*,
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Frederic M. Miller,
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Sherwin J. Markman,
Des Moines, Iowa,
Charles F. Brannan,
Denver, Colorado, *Attorneys for Appellee*

Before Gardner, Chief Judge, and Woodrough and Vogel, Circuit Judges

Woodrough, Circuit Judge.

1. The judgment here appealed from finds that appellant guilty of contempt and imposes a fine upon him for violating an injunction issued in this case in favor of Farmers' Educational and Cooperative Union of Amer-

ica, here referred to as plaintiff, against appellant and others, as defendants, on June 11, 1956, in accord with the opinion of the district court, reported in *Farmers' Educational & Cooperative Union of America vs. Farmers Educational & Cooperative Union of America, Iowa Division*, 141 F. Supp. 820. Appeal was taken by the defendants, including the appellant herein, from the injunctional decree and this Court affirmed it in all respects, as reported in *Iowa Farmers Union v. Farmers' Educational & Cooperative Union*, 247 F. 2d 809, and we caused a copy of the judgment and decree of injunction, together with material findings and conclusions of the district court to be appended and published with our opinion.

As fully appears in those reports, the appellant, Fred W. Stover, is the president and principal managing officer of the two Iowa Corporations which operated for years under a charter from the plaintiff and were identified with the plaintiff by using its registered trade marks, service marks, and symbol in publishing a newspaper and rendering the other services to farmers for which the plaintiff, and the corporations to which it granted its franchise, were organized. In March of 1954, the charter of the two corporations was revoked by the parent corporation and their connection with the plaintiff was duly and lawfully terminated. But at the instigation and under the direction of this appellant, they continued their operations, as they had carried them on before under their franchise from plaintiff, and infringed the plaintiff's trade marks and symbol, and in the same connection, engaged in unfair competition against the plaintiff.

The decree, issued June 13, 1956, enjoining them from continuing their wrongful infringement and unfair competition appears in words and figures at 247 F. 2d 809, 812-813.

On September 10, 1956, the plaintiff filed application for citation for contempt in the action against appellant, charging him with deliberately acting in violation of the injunction and praying that he be held in contempt of court and punished therefor.

Issues were joined and the court found, on the trial, that the appellant here had continued to do that which he had been enjoined from doing and was guilty of contempt and subject to penalty. The opinion of the court is reported at 150 F. Supp. 422. Its findings and conclusions (omitting some repetitions) included the following:

> "3. Defendant, Fred W. Stover, is the President and principal managing officer of the Iowa Farmers' Union and the Iowa Union Farmer Association. He publishes and is an editorial contributor on the newspaper now known as 'U. S. Farm Union News,' formerly known as 'Iowa Union Farmer.' He is in charge of the activities of said Iowa Farmers Union and said Iowa Union Farmer Association, including the solicitation of subscriptions, memberships, dues and contributions and is in charge of the records and headquarters of said corporation. Not only is he bound to comply with the injunction, quoted in Paragraph 1 hereof, supra, but is under the duty to so supervise and direct the affairs of said corporation that they likewise in their activity would obey said injunction."
>
> "4. The continued use of the names, 'Iowa Farmers Union' and 'Iowa Union Farmer Associations,' by said corporations, and in particular by the defend-

ant, Fred W. Stover, has created confusion and misunderstanding in the community and directly violates the injunction. The name, 'U. S. Farm Union News,' is so similar to 'Iowa Union Farmer' that it is deceptive and confusing and creates confusion and misunderstanding among the farm people of Iowa."

"5. Except for the change of the name of the newspaper from 'Iowa Union Farmer' to 'U. S. Farm Union News,' defendant Fred W. Stover, as president of defendants, Iowa Farmers Union and Iowa Union Farmer Ass'n, has conducted the affairs of both of said corporations since the entry of said decree the same as he did prior thereto. There can be no reasonable doubt or question that defendant, Fred W. Stover, violated the injunction herein. He is guilty of contempt and is subject to penalty therefor."

"Conclusions of Law"

"1. As stated above, Judge Harper found that defendants were infringing plaintiff's registered marks and enjoined them from further infringement thereof. Except for the change in the name of the defendants' newspaper from 'Iowa Union Farmer' to 'U. S. Farm News,' defendants, including and under supervision of the defendant, Fred W. Stover, have continued their operations since the entry of the injunction the same as they had prior thereto. There has been no substantial effort to comply with the injunction. Obviously, defendant, Fred W. Stover, continued to do that which he was enjoined from doing. He is guilty of contempt and is subject to penalty."

"2. The name of a newspaper is in the nature of a trade mark. The law of trade names is identical with that of trade marks. Rights that may accrue in a trade name are by reason of the fact that such trade names become in law a trade mark. While a trade name is not strictly a trade mark, it is generally governed as to its use by the same rules as a trade mark."

"3. Plaintiff has registered its marks, 'Union Farmer' and 'Farmers Union.' Judge Harper's findings and conclusions adjudicated that defendants' use of the trade name, 'Iowa Farmers Union' infringed plaintiff's registered mark, 'Farmers Union' and that defendants' use of the trade name 'Iowa Union Farmer Association' infringed plaintiff's registered mark 'Union Farmer.' The adjudications thus made are not subject to collateral attack in these proceedings. Defendant, Fred W. Stover, as president of the Iowa Farmers Union, and as president of the Iowa Union Farmer Association, has done nothing whatever to terminate said infringements by said corporation. He is clearly guilty of contempt. In continuing to supervise and direct the activities of said two corporations, defendant, Fred W. Stover, has clearly violated the injunction."

"4. The change of the name of the newspaper from 'Iowa Union Farmer' to 'U. S. Farm Union News' does not avoid infringement of plaintiff's registered marks. The confusion which has existed heretofore is bound to continue and to reoccur because of the similarity of the name to plaintiff's marks, particularly when the type of subscribers to defendants' newspaper and to plaintiff's newspapers is considered."

The judgment was as follows:

"Judgment and Decree"

"It is hereby ordered, adjudged and decreed that the defendant, Fred W. Stover, is found to be in contempt of court for violation of the injunction entered in this cause on June 11, 1956, and accordingly is ordered to forthwith pay to the clerk of this court a fine of one thousand dollars ($1,000.00), provided, however, that, if, within ten days after the entry of this judgment herein, he procures the discontinuance of the corporate names, Iowa Farmers Union and Iowa Union Farmer Association, procures the

discontinuance of the name, U. S. Farm Union News, and of the reference to the fact that it was formerly Iowa Union Farmer, procures the removal of the sign, 'Iowa Farmers Union,' over the entrance to the place of business of said corporation, ceases to solicit funds, contributions and dues for either an Iowa Farmers Union or an Iowa Union Farmer Association, and otherwise complies with the injunction herein, then said fine shall be reduced to five hundred dollars ($500.00)."

"It is further ordered that judgment be entered against the defendant, Fred W. Stover, for the costs of this proceeding."

Subsequent to the entry of the judgment, the court overruled objections to its findings, conclusions and judgment. It cited 18 U. S. C. A. at 401, as follows:

"A court of the United States shall have power to punish by fine or imprisonment, *at its discretion*, (emphasis mine) such contempt of its authority, and none other, as—

* * * * * *

"(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

The court said, "quite clearly, the contemnor in this case was charged with disobedience to a lawful decree heretofore entered in a proceeding to which the contemnor was a party."

Supersedeas was allowed the appellant and on this appeal he asserts error in his conviction and fine and argues as points for reversal that: (1) the decree of injunction entered in this action on June 13, 1956, did not enjoin the defendants from the use of the trade names contained in the titles of the corporate defendants so that his conduct of carrying on the same business as before

the injunction and using "Farmers Union" and "Union Farmers," was not covered by the injunction and; (2) that if civil contempt was established, no damages were proven and no fine could be assessed against him.

1. As to the injunction.

It adjudicates the right of the plaintiff to the exclusive use of "'Union Farmer' in connection with the printing, publication and distribution of any newspaper or like periodical and to the exclusive use of the words 'Farmers Union' * * * in connection with dissemination of information pertaining to farming and related industries, and particularly information in connection with cooperatives to aid the farmer in marketing his produce, information relating to educational and entertainment programs, for farmers and their families, information as to proposed legislation that directly or indirectly may affect those engaged in farming and related industries, and services to and for the farmer relating to storage of produce, the making of mortgage loans, the brokerage of produce and livestock, the sale of insurance, and the servicing of farm equipment, and from in any way, directly or indirectly attempting to compete with the plaintiff in its use of said trade marks." (150 F. Supp. 423.) The trial court found that appellant, acting as president of "Iowa Union Farmer Association," after the issuance of the injunction against him, supervised the publication and distribution of a newspaper entitled, U. S. Farm Union News (formerly Iowa Union Farmer), denominated the May-June, 1956, issue of said newspaper and solicited contributions for the Iowa Union Farmer Association and engaged in unfair competition against the plaintiff.

The findings are fully supported by the evidence and in turn support the court's conclusion that appellant violated the injunction. The slight alterations in the name of the newspaper appellant published, changing "Farmers" to "Farm" but retaining "Union" and adding "formerly Iowa Union Farmer" were obviously to circumvent the letter of the injunction while adhering to the infringement and unfair competition.

The argument that appellant may so continue his invasion of the trade mark rights of the plaintiff despite the injunction that was issued against him, after full hearing and fair trial is without merit.

It is true, the injunction prohibits misuse of "marks" and "words" and does not say corporate names. But the Lanham Act includes "names" and "words" in its definition of trade marks and service marks, 15 U. S. C. A. at 1127, and the injunction in this case was sufficiently phrased and worded to apprise the appellant of the prohibition against his infringement and unauthorized and unfair competition against plaintiff. It is immaterial that the injunction did not include general prohibition of any use of the corporate names of the defendants. It plainly and unambiguously forbade the appellant to use the registered words that had acquired secondary meaning to intrude upon and take away the business that belonged to plaintiff. His violations were properly held to be wilful and in contempt of court.

Appellant has cited *L. E. Waterman Co. v. Modern Pen Co.*, 235 U. S. 88, 96, 35 S. Ct. 91, 93, 59 L. Ed. 142; *L'Aiglon Apparel, Inc., v. Lana Lobell, Inc.*, 3 Cir., 214 F. 2d 649; *American Auto Association v. Spiegel*, 2 Cir.,

205 F. 2d 771; and *King Pharr Canning Corporation v. Pharr Canning Co.*, D. C. Ark., 85 F. Supp. 150, as tending to support his contention that the injunction herein does not cover his conduct. We do not find such support in the cases cited.

2. As to the proof of damage to the plaintiff.

(2) It was clear to this court on the appeal from the decree of injunction that the wrongful conduct of this appellant and his co-defendants in infringing the plaintiff's marks and engaging in unfair competition against plaintiff, in connection with such infringement, "greatly increases the cost and difficulty plaintiff encounters in its undertaking to re-establish the Iowa division which is essential to its national organization and interstate operation," and on the trial for the contempt, it was shown that after the injunction was issued, the plaintiff spent about thirty-seven or thirty-eight thousand dollars on its organization work in Iowa, in addition to publications, news letters and other materials. Specific instances where appellant's activities interfered with or prevented organization meetings planned by plaintiff were proved. [illegible] it is true that the evidence does not afford means to compute mathematically the precise amount of plaintiff's damage, and indeed the amount is not susceptible of such determination, the evidence leaves no doubt that damage far beyond the amount of the fine, that was imposed was directly caused the plaintiff by appellants' wrongful conduct. Undoubtedly the cost of attorneys services that was directly caused were of value greater than the fine.

In *United States v. Onan*, 8 Cir., 190 F. 2d 1, 9, this

court said as to a fine imposed for civil contempt:

> "* * * The precise amount of actual damage was doubtless not susceptible of determination but the flagrant and wanton abuse by appellants of judicial process in issuing and serving these garnishee summonses on the various banks in which defendants had large deposits subjected defendants to substantial expense in retaining counsel and in obtaining an order quashing the summonses. The evidence was all before the trial court and there was no evidence offered by appellants to the contrary. We think a fine of $2500.00 as reimbursement for the damages suffered by appellees was sustained by substantial evidence."

No term of imprisonment was imposed and the fine was upon conditions affording the appellant a liberal locus poenitentiae.

It is argued that matters this appellant caused to be published, after the issuance of the injunction, in the newspaper of the Iowa Union Farmer Association reflecting upon the court and its issuance of the injunction and declaring that "the paper" would continue, notwithstanding the injunction, was privileged matter under the first amendment to the Federal Constitution and afforded no basis for the finding of contempt. But it does not appear that the court rested its findings of contempt upon that phase of appellant's publications and no discussion of it appears to be called for here.

We find no error in the proceedings and judgment and affirm the judgment with direction that the alternative privilege accorded the appellant be extended thirty days from the entry hereof.

Affirmed.

APPENDIX "B"

STATUTES INVOLVED

28 U. S. C. A., § 1338

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases.

(b) The district courts shall have original jurisdiction of any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trade-mark laws.

15 U. S. C. A. § 1053

Subject to the provisions relating to the registration of trade-marks, so far as they are applicable, service marks used in commerce shall be registrable, in the same manner and with the same effect as are trade-marks, and when registered they shall be entitled to the protection provided in this chapter in the case of trade-marks, except when used so as to represent falsely that the owner thereof makes or sells the goods on which such mark is used. The Commissioner may establish a separate register for such service marks. Applications and procedure under this section shall conform as nearly as practicable to those prescribed for the registration of trade-marks.

15 U. S. C. A. § 1054

Subject to the provisions relating to the registration of trade-marks, so far as they are applicable, collective

and certification marks, including indications of regional origin used in commerce, shall be registrable under this chapter, in the same manner and with the same effect as are trade-marks, by persons, and nations, States, municipalities, and the like, exercising legitimate control over the use of the marks sought to be registered, even though in possessing an industrial or commercial establishment and when registered they shall be entitled to the protection provided in this chapter in the case of trade-marks, except when used so as to represent falsely that the owner or a user thereof makes or sells the goods or performs the services on or in connection with which such mark is used. The Commissioner may establish a separate register for such collective marks and certification marks. Applications and procedure under this section shall conform as nearly as practicable to those prescribed for the registration of trade-marks.